77-1730

No. _____

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN T. CLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ATTORNEYS FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. _____

JOHN T. CLINTON, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN T. CLINTON, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit. The Judgment in the case was entered April 6, 1978. A Petition for Rehearing was filed April 17, 1978 and was denied May 3, 1978.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals, as yet unreported, appears as Appendix A, infra p. A-1. The Opinion of the Trial Court was entered May 2, 1977 as a General Finding of Fact of Guilt and appears as Appendix B, p. B-1.

JURISDICTION

The denial of Petition for Rehearing was filed May 3, 1978. Appendix C, p. C-1. Under *U.S. v. Healy,* 376 U.S. 75, 11 L.Ed.2d 527, 84 S.Ct. 553 (1964), when a Petition for Rehearing is filed, the time for filing runs from date of denial. This Petition was filed within thirty days of the denial. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

The Defendant was convicted under 26 USC 7203 for the crime of willfully failing to file his Federal Income Tax Return. An Information for this offense was issued from a judicial district where he did not reside and where he was not personally present. He was a "tax resister" at the time the Information was filed.

The Questions Are:

1. Was the Defendant denied his First Amendment right of free speech by the Trial Court's refusal to allow him any discovery and a selective prosecution hearing?

2. Whether the United States Attorney in a judicial district where the Defendant is not present, does not reside, and is not obligated to file a tax return has authority to file an Information for failure to file income tax returns.

3. Whether the Western Judicial District of the State of Washington has jurisdiction to initiate Federal criminal action for failure to file income tax returns where the Defendant resided and was physically present in another district and filed his returns, when he did file, at the Regional Service Center at Ogden, Utah.

These questions are of national effect and importance.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment One.
"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble."

Constitution of the United States, Amendment Five.
"Life, liberty . . . with due process of law."

Constitution of the United States, Amendment Six.
"In all criminal prosecutions the accused shall have . . . compulsory process for obtaining witnesses in his favor."

STATEMENT OF FACTS

Petitioner, John T. Clinton, was charged by Information at Seattle, Washington, with two counts of failing to file income tax returns for the years 1972 and 1973. He lived, for at least the last twenty years, in Spokane, Washington, wholly located within the Eastern Judicial District of the State of Washington. Seattle is in the Western Judicial District. When Clinton filed he filed at the Service Center at Ogden, Utah as required by Federal statute.

A Motion to Dismiss the action was timely filed along with a Protective Motion for Change of Venue. The Venue Motion was granted, but not the Motion to Dismiss.

Petitioner also filed a Motion for a Hearing to determine selective prosecution. On argument, the Assistant U.S. Attorney admitted the Defendant was a "tax protestor." Despite this admission, the Motion for a hearing was totally denied.

Reasons for granting the Writ:

1. This Court has never decided whether a U.S. Attorney in one district has authority to file an Information in another district for a Federal crime where the accused has no minimal contacts or obligations whatsoever in the district of filing. This is an important question of Federal law that should be settled by the Court.

28 USC 547 states clearly that each United States Attorney shall prosecute crime "within his district." 28 USC 541(a) gives the President, with consent of the Senate, power to appoint U.S. Attorneys for "each judicial district."

This Court has said in *U.S. v. Winston,* 18 S.Ct. 701, 170 U.S. 522, 42 L.Ed. 1130 (1897):

> "He is the district attorney of the United States in the district. So far as locality is concerned, the boundaries of the districts are the limits of duty."

Allowing the U.S. Attorney of one district to file Information on citizens of another district allows the Internal Revenue Service to "shop" in all the districts until they find a U.S. Attorney who is willing to file an Information. This violates the duty of the courts to prevent overbearing Federalism.

2. The decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the decision in *United States v. Calhoun,* 566 F.2d 969 (5th Cir. 1978).

The rule enunciated by the Ninth Circuit is that:

> "Failure to file a tax return is an offense either at the Defendant's place of residence, or at the collection point where the return should have been filed."

The Court erroneously held that the return could have been filed in Seattle, Washington, ignoring the Service Center statute, 26 USC 6091(b)(1)(A)(ii), requiring service center filing where a service center has been established, (Ogden, Utah).

The decision in the Fifth Circuit, *U.S. v. Calhoun,* rendered January 27, 1978 and reported at 566 F.2d 969, involves a conviction for failure to file returns under the same statute, (26 USC 7203). The Fifth Circuit said the law is that:

> "The crime of failure to file an income tax return is committed in the judicial district in which the taxpayer is required to file."
>
> "The General Rule is that a taxpayer shall make his return 'to the secretary or his delegate . . . in the Internal Revenue District' or his 'legal residence' or at the designated service center for that district." (973)

Under the *Calhoun* decision, Petitioner's Information here would have been dismissed as he could only be charged in the Spokane Judicial District or Utah. There is no reference to a "collection point" in any statute or case. The two are far from synonymous. The Ninth Circuit apparently held that any city in the Western Region was a collection point; hence, the Defendant could be, in their view, prosecuted in any district within the fourteen states of the Region.

3. The Defendant was denied due process by the Court's failure to grant a selective prosecution hearing.

The Ninth Circuit's own case of *Oaks v. U.S.*, 508 F.2d 1403 (9th Cir. 1974) requires a selective prosecution hearing:

> "When enough facts are alleged to take the question past the frivolous stage." (1404)

At the argument on the Motion for the hearing the Assistant U.S. Attorney stated to the Court:

> "Your Honor, I just—Mr. Hammer, who is the IRS agent, who conducted the investigation, just indicated to me that he was not aware that Mr. Clinton was a tax protestor until almost the end of his investigation, . . ."

The awareness was prior to the criminal charge, hence the United States admitted that prior to filing the Information the Defendant was known by the I.R.S. to be a "tax protester." This admission alone was enough to get the case past the frivolous stage and allow the hearing.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Court of Appeals for the Ninth Circuit.

Respectively submitted,

ROBERT E. KOVACEVICH
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Dated: May 23, 1978

/lan

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOHN T. CLINTON,
APPELLANT.

No. 77-2447

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

Before: ELY, TRASK and ANDERSON, Circuit Judges

PER CURIAM:

Appellant, John T. Clinton, a self-proclaimed "tax protester," was found guilty of two counts of willful and knowing failure to file a federal income tax return for the years 1972 and 1973. This was a violation of 26 U.S.C. §7203.

In this appeal he challenges the authority of the United States Attorney for the Western District of Washington to prosecute him for offenses allegedly not committed in that district. At all times, appellant has been a resident of Spokane, Washington, which is in the Eastern District of Washington. As a second defense, the charges that the United States Attorney engaged in selective or discriminatory prosecution.

Neither argument is well taken.

The United States Attorney for the Western District of Washington initiated appellant's prosecution. Appellant moved to dismiss the information on the basis that the United

States Attorney in the Western District had no jurisdiction over him since he was a resident of the Eastern District. The district court construed the motion to dismiss as a motion to transfer venue to the Eastern District. This was granted under 18 U.S.C. §3237(b). Appellant then renewed his motion to dismiss, but it was denied.

The place of commission of the offense of failure to file a return is not specifically set out in the statute. Section 7203 proscribes the failure to do a specified act required by the Internal Revenue Code and the regulations promulgated under it. When a statute does not indicate where Congress considered the place of committing the crime to be, the site or *locus delecti* must be determined from the nature of the crime and the location of the acts or omissions constituting the offense. *United States v. Anderson,* 328 U.S. 699 (1946).

Failure to file a tax return is an offense either at the defendant's place of residence, or at the collection point where the return should have been filed. *Yarborough v. United States,* 230 F.2d 56, 58 (4th Cir.), *cert. denied,* 351 U.S. 969 (1956); *United States v. Commerford, 64 F.2d 28, 32-33 (2d Cir.), cert. denied,* 289 U.S. 759 (1933); *see United States v. Anderson, supra.* Since appellant could have filed his return at the collection center in Seattle, Washington, the United States Attorney for the Western District had jurisdiction to prosecute the offense.

The evidence is insufficient to establish appellant's claim of discriminatory selective prosecution or to take his claim past the frivolous stage. *United States v. Oaks,* 508 F.2d 1403 (9th Cir. 1974).

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOHN T. CLINTON,
APPELLANT.

No. CR-76-148-1

GENERAL FINDING OF FACT OF GUILT

THIS MATTER having come regularly on for trial on April 27, 1977, before the Honorable Marshall A. Neill, trial by jury having been duly waived, and the Court having considered the evidence presented and the remarks of counsel, and being fully advised in the premises, pursuant to Federal Rules of Criminal Procedure 23(c), the Court now finds, generally:

I

That the defendant is guilty of the offense of willful failure to file income tax returns for the calendar year 1972 in violation of 26 USC §7203, as alleged in Court I of the Amended Information filed herein; and

II

That the defendant is guilty of the offense of willful failure to file income tax returns for the calendar year 1973 in violation of 26 USC §7203, as alleged in Court II of the Amended Information filed herein.

DATED this _____ day of April, 1977.

_____
United States District Judge

Presented by:

_____
SEATON M. DALY, JR.
Assistant United States Attorney

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE,

v.

JOHN T. CLINTON,
APPELLANT.

No. 77-2447

ORDER

Before: ELY, TRASK and ANDERSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for failure to file income tax returns for 1972 and 1973 on the grounds that the Information was filed in the wrong district and that he was the subject of selective prosecution.

After a non-jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted on two counts of willful failure to file income tax returns for 1972 and 1973, in violation of 26 U.S.C. 7203. The district court sentenced him to a one-year prison term on each count to run concurrently, 60 days of which was to be served and the balance suspended, followed by a four-year period of probation. The court also required petitioner to pay the costs of prosecution.

The charges against petitioner were set forth in an Information filed by the United States Attorney for the Western District of Washington. For more than 20 years petitioner had continuously maintained his legal residence in Spokane, Washington, which is located in the Eastern District of Washington. Prior to trial, petitioner moved to dismiss the Information for lack of jurisdiction, alleging that venue did not lie in the Western District of Washington. The district court treated petitioner's motion to dismiss as a motion to transfer venue to the Eastern District, which it granted pursuant to 18 U.S.C. 3237(b). Thereafter, petitioner renewed his motion to dismiss and additionally moved for a hearing to determine selective prosecution. The district court denied both motions and, after a trial, entered a general finding of guilt as to both counts (Pet. 3; Pet. App. B-1). The court of appeals affirmed (Pet. App. A).

1. The court of appeals correctly held that the information was properly filed in the Western District of Washington. A violation of 26 U.S.C. 7203 occurs in the judicial district in which a taxpayer is required to file his return. *United States* v. *Calhoun*, 566 F. 2d 969, 973 (C.A. 5). An individual taxpayer is required to file his income tax return in the internal revenue district of his legal residence or at the designated Regional Service Center for the district. 26 U.S.C. 6091(b)(1). The State of Washington constitutes one internal revenue district, with the district office being located in Seattle. 1 Int. Rev. Manual, Administration (CCH), par. 1119.3(47), p. 1153 (March 1978).

Petitioner's assertion (Pet. 4) that he could only be charged in the judicial district of either his residence (the Eastern District of Washington) or the Service Center (the District of Utah) ignores the plain language of Section 6091(b)(1)(A)(i) and (ii) (26 U.S.C.), which provides that the returns must be filed in the *internal revenue district* of taxpayer's legal residence or at the Service Center

encompassing that district. Accordingly, petitioner was required to file his returns at the District Office in Seattle (within the Western District of Washington), or at the Service Center in Ogden, Utah. Here, petitioner failed to file his returns at either the district office in Seattle or the Service Center in Ogden. This failure to file a return in either the Western District of Washington (where the district office was located) or in the district of Utah (where the Service Center was located) is an offense in both judicial districts; venue could therefore lie in either district. *United States* v. *Commerford*, 64 F. 2d 28, 32-33 (C.A. 2), certiorari denied, 289 U.S. 759; *Yarborough* v. *United States*, 230 F. 2d 56, 58 (C.A. 4), certiorari denied, 351 U.S. 969; see also *United States* v. *Anderson*, 328 U.S. 699. Since petitioner could have filed his returns at the district office in Seattle and failed to do so, venue was properly in the Western District of Washington.

2. Petitioner further contends (Pet. 4-5) that the district court erred in refusing to hold an evidentiary hearing on his assertion of selective prosecution. A defendant is entitled to an evidentiary hearing on a claim of selective prosecution only if he alleges sufficient facts to take the case past the frivolous stage. *United States* v. *Oaks*, 508 F. 2d 1403 (C.A. 9). But the only fact petitioner alleges in support of his claim is that he was a "tax protester." This allegation is of no consequence. Petitioner's status as a tax protester standing alone did not justify an evidentiary hearing nor insulate him from prosecution for failure to file tax returns.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

DOJ-1978-09